

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
UNITED STATES DEPARTMENT OF
DEFENSE, UNITED STATES AIR
FORCE, MCCHORD AIR FORCE
BASE, WASHINGTON,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-57

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the appeal of a civil penalty of \$10,000 for asserted violations of the state's dangerous waste regulations, came on for hearing before the Pollution Control Hearings Board on December 20, 1985 and January 3, 1986, at the Board's offices in Lacey, Washington.

Appellant United States Air Force was represented by Miguel Pereira, David Bateman and Rocco Lamuro, Attorneys-at-Law. Respondent Department of Ecology was represented by Jay J. Manning, Assistant Attorney General. Proceedings were reported by Donna K. Woods and

1 Nancy Miller of Robert H. Lewis and Associates.

2 Witnesses were sworn and testified. Exhibits were admitted and
3 examined. Argument was made by post-hearing briefs. From the
4 testimony, evidence and contentions of the parties, the Board makes
5 these

6 FINDINGS OF FACT

7 I

8 The United States Department of Defense through the United States
9 Air Force operates McChord Air Force Base in Pierce County,
10 Washington. In the operation of this facility various chemicals are
11 used, ultimately resulting in the generation of wastes. Some of these
12 wastes present hazards to human health or environmental resources
13 sufficient to be categorized as dangerous wastes under state law.

14 II

15 The Washington Department of Ecology is a state agency with the
16 responsibility for implementing and enforcing the dangerous waste law
17 of the state, and authorized to operate the state program in lieu of
18 the federal hazardous waste program administered by the United States
19 Environmental Protection Agency.

20 III

21 On January 9, 1985, Ecology issued a notice of civil penalty to
22 the Air Force (No. DE 84-736), assessing a fine of \$10,000. This
23 notice referred to an inspection at McChord and recited the following:

24 During a November 2, 1984 inspection by WDOE
25 personnel, twenty-eight (28) barrels of dangerous
26 wastes were discovered on "C" ramp. The following
violations of Chapter 173-303 WAC were documented:

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1 1. WAC 173-303-190(2) and (3) - Failure to properly
2 label and mark all containers prior to offering
3 dangerous waste for transport to an off-site TSD
4 facility.

5 2. WAC 173-303-200(1)(a) - Failure to ship dangerous
6 waste to an off-site TSD facility or to an on-site
7 facility permitted for such activities under WAC
8 173-303-800 through WAC 173-303-845 in less than 90
9 days.

10 3. WAC 173-303-200(1)(c) - Lack of accumulation
11 dates on all containers.

12 4. WAC 173-303-200(1)(d) - Failure to label each
13 container identifying the major risk(s) associated
14 with the waste.

15 5. WAC 173-303-630(5)(b) - Storing containers of
16 dangerous waste in a manner which may rupture the
17 container or cause it to leak.

18 IV

19 On January 25, 1985, the Air Force applied to Ecology for relief
20 from the penalty. The application stated that the 28 barrels of waste
21 had been transported to Arlington, Oregon, on December 4, 1984. The
22 Board takes notice that Arlington is an approved disposal site for
23 dangerous wastes.

24 The application also described steps taken after issuance of the
25 penalty to assure compliance with Ecology's regulations. No assertion
26 was made that the alleged violations did not occur.

27 Ecology affirmed its fine by notice issued on March 13, 1985, and,
on April 15, 1985, the Air Force filed its notice of appeal with this
Board. An amendment to the appeal was filed on May 10, 1985.

28 V

29 The observations made by Ecology personnel on November 2, 1984,

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1 were not a part of a thorough formal inspection. Three Ecology
2 employees, who were on the base to discuss an entirely different
3 matter, happened upon the 28 barrels as they were leaving. Their
4 inspection was limited to a brief visual reconnaissance. No samples
5 were taken. Two of the Ecology employees were persons who had
6 experience in the dangerous waste program, but the agency inspector
7 with direct responsibility for compliance at McChord was not present.

8 The barrels caught the attention of the Ecology group because they
9 were labelled with the standard yellow "Hazardous Waste" stickers, but
10 were sitting out in the open in an apparently unprotected area--not a
11 location they would normally expect to find such things.

12 VI

13 All parties agree that the 28 barrels were, on the date in
14 question, located where the Ecology personnel found them. The locale
15 is on the edge of "D" ramp rather than "C" ramp as first asserted.
16 "D" ramp is one of the huge paved areas of the base. The barrels were
17 sitting on pallets in two rows below a curbing which divides the paved
18 ramp from a grassy area. Earlier in the day it had been raining and
19 there was standing water on the tops of the barrels.

20 VII

21 The "Hazardous Waste" label contains a number of blanks to be
22 filled in by the generator of wastes to show, among other things, the
23 identity of the generator, waste identification numbers and the
24 accumulation start date. The latter is to provide a record of how
25 long the wastes in a particular barrel have been at the generation

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1 site.

2 In the instant case, the "Hazardous Waste" label was attached to
3 each barrel and the blanks were filled in by use of a purple marker.
4 As a result of exposure to the elements, the writing faded to a very
5 light pink on many stickers and was in some cases not easily
6 discernible when observed on November 2. We find, however, that the
7 accumulation date was marked on each barrel and that such could be
8 deciphered on close inspection.

9 VIII

10 At least two of the labels bore clearly legible accumulation dates
11 indicating that the wastes had been on site in excess of 90 days. We
12 have no evidence that these accumulation dates were in error.

13 On the date in question, McChord did not contain a permitted
14 on-site facility for treatment, storage or disposal of dangerous
15 wastes.

16 IX

17 In addition to the "Hazardous Waste" label, each barrel bore
18 stenciled markings descriptive of its contents. Twenty-two (22) of
19 the barrels were marked "waste water emulsifier;" 5 of the barrels
20 were marked "PD 680;" one was marked "ferric bromide."

21 But none of the barrels bore a standard Department of
22 Transportation sticker warning of the major risk associated with the
23 waste (e.g., "corrosive," "flammable"), nor any other marking directly
24 and explicitly identifying such risk.

X

The Ecology personnel observed bubbling at the bungs of some of the barrels, a condition which they interpret as presenting a high potential for leakage.

The "D" ramp area where the barrels were placed is served by a drain that eventually connects to the sanitary sewer system of the adjacent United States Army base at Fort Lewis. Prior to emptying into the sewer, runoff from the area flows through an oil/water separator. There is some capacity here to catch and retain spills. But in storm events this capacity could be exceeded, and water soluble materials would eventually escape in any event. A potential, thus, exists at the site for the escape of dangerous wastes, posing some risk to the sewage treatment plant and the environment beyond.

XI

McChord Air Force Base operates twenty-four hours a day. It is a fenced and patrolled military establishment. Access is obtained through manned entry gates. "D" ramp is a part of the flight line where operations are continuous. People are in the area all the time. Aircraft come and go at all hours. The area is well-lighted at night. It is not the kind of location where sabotage would be easy, nor where a mishap would long go undetected.

XII

The paving on "D" ramp is marked with yellow lines showing desired paths of movement for planes and motor vehicles. The barrels in

1 question were on the very edge of the pavement at a spot where neither
2 cars nor planes are supposed to go. It is well beyond the reach of
3 the wing tip of the largest plane which might properly be moved
4 through the area.

5 Nonetheless, the site is totally exposed to outside forces and
6 accidents do happen. The risk that barrels, thus stored, might be
7 ruptured is substantially greater than if they were enclosed inside a
8 secure building.

9 XIII

10 After looking over the barrels, the three Ecology employees left
11 the base without further contact with any Air Force personnel. Back
12 of their office, they contacted the Ecology inspector with
13 responsibility for McChord and advised what they had seen. The
14 inspector immediately telephoned the base and advised of the situation.

15 As a result of the call, the barrels were immediately inspected
16 and it was verified to Ecology's satisfaction that no leakage had
17 occurred or was occurring. A building satisfactory for temporary
18 storage was found and the following morning the barrels were moved in
19 there and out of the weather. No signs of significant damage or
20 deterioration was noted in the barrels. Air Force personnel remarked
21 the writings, including accumulation dates, on the "Hazardous Waste"
22 stickers by deciphering the faded previous markings.

23 Ecology, though advised of these actions, conducted no follow-up
24 inspection.

XIV

It is undisputed that 22 of the barrels, in fact, contained "waste water emulsifier;" that 5 of them contained "PD 680;" and that one contained "ferric bromide."

There is no dispute that PD 680 and ferric bromide wastes are properly categorized as dangerous wastes. However, the risks associated with the waste water emulsifier were unknown on November 2, 1984. Not until the following summer did the Air Force obtain a thorough analysis of this material, allowing a determination of whether it should be designated as dangerous waste or not.

The laboratory results supported the conclusion that a dangerous waste designation is not warranted and, on review of the data, Ecology concurred on July 12, 1985. Ecology, thereupon, removed any objection to dumping this material directly in the sanitary sewer. And, thus, it became clear that 22 of the labelled barrels observed on "D" ramp on November 2, 1984, were not dangerous waste at all.

XV

Ecology's penalty was influenced in a major way by the agency's past experience with dangerous waste compliance at McChord. Inspections in 1982 and 1983 had produced evidence of spills and other improper disposal of waste. Following a formal inspection on May 2, 1984, Ecology's inspector produced a veritable laundry list of items to be corrected. In writing to the Air Force to request corrective action, he stated that McChord was "alarmingly out of compliance" with federal and state requirements.

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1 Significant among the shortcomings found was the failure to
2 complete designation of the dangerous wastes generated at the base.
3 Designation is a procedure by which, through written sources or
4 laboratory analysis, the risk of harm from a generator's wastes is
5 evaluated. Designated wastes are those which pose sufficient hazard
6 to be regulated under the dangerous waste program. Designation is the
7 necessary first step to knowing how to handle any particular item of
8 waste. It is the foundation of the entire regulatory system.

9 The inspector also dealt with McChord's intention to convert
10 Building #14 to a short-term (less than 90 days) storage 'area.' He
11 asked for a plan for segregating incompatible wastes in the building.

12 XVI

13 The Air Force did not dispute the findings from the May 2, 1984,
14 inspection, but rather initiated a flurry of activity to bring the
15 base into compliance.

16 A decision was made to withhold wastes which had not yet been
17 designated from the sewer system. As a consequence, the undesignated
18 waste water emulsifier (soapy water from airplane washing operations)
19 was thereafter placed in barrels, labeled "Hazardous Waste" and stored
20 until it could be transferred to approved off-base storage or disposal
21 locations.

22 XVII

23 In September, 1984, the Air Force submitted to Ecology plans for
24 modifying Building #14. On October 11, Ecology approved the plans
25 with conditions. The Air Force promptly undertook the necessary work

1 to accomplish the mandated changes.

2 While this work was going on the barrels of waste on hand were
3 moved out of the building. Efforts to find a place for immediate
4 storage or disposal of these materials off-base were unsuccessful.
5 This is how the 28 barrels in question came to be placed outside on
6 the edge of "D" ramp.

7 Ecology's permission for such placement was not asked. Had it
8 been, Ecology's witnesses uniformly and emphatically declared that
9 permission would have been denied.

10 XVII

11 At the time the barrels were moved out onto "D" ramp, they had not
12 yet been offered for transport to an off-site facility. Placing them
13 on "D" ramp was viewed as a temporary expedient until Building #14 was
14 finished or an off-base transfer could be arranged.

15 Nonetheless, the selection of this unprotected location was not
16 shown to be an unavoidable necessity. As noted, a building was found
17 for the drums the day after Ecology discovered them.

18 XVIII

19 In June of 1985, Ecology conducted another formal dangerous waste
20 inspection at McChord. Although some discrepancies were noted, the
21 agency in forwarding its findings commended the Air Force on
22 "extraordinary gains" in compliance. An ongoing problem identified,
23 however, was the still incomplete designation process for the Base's
24 wastes.

25 The record before us shows that really vigorous effort at McChord
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1 to bring the facility into compliance commenced after Ecology's May
2 1984 inspection. The situation observed on November 2, 1984, was, in
3 part, attributable to that effort. After that and since the civil
4 penalty was issued, progress has been continuing.

5 No further orders or penalties have been issued to the facility.
6 However, the total job of waste designation remained unfinished at the
7 time of hearing. Had this effort been systematically pursued earlier,
8 the mislabeling of the 22 barrels of waste water emulsifier would
9 never have occurred.

10 XIX

11 Any Conclusion of Law which is deemed a Finding of Fact is hereby
12 adopted as such.

13 From these Findings of Fact, the Board comes to these

14 CONCLUSIONS OF LAW

15 I

16 The Board has jurisdiction over the issues and the parties. Our
17 earlier order (September 11, 1985) concerning the Board's authority to
18 hear this case is reaffirmed. That order is attached hereto as
19 Attachment A and incorporated hereby into this final decision document.

20 II

21 We reaffirm our denial of the Air Force's Motion to Dismiss at the
22 close of Ecology's case.

23 III

24 Five separate and distinct violations of chapter 173-303 WAC,
25 Dangerous Waste Regulations, were asserted as the basis for the

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1 \$10,000 penalty imposed. We take these up in the order listed in the
2 Notice of Penalty.

3 IV

4 WAC 173-303-190(2) and (3) relate to labeling and marking
5 requirements "before transporting off-site or offering for off-site
6 transport any dangerous waste."

7 Since the wastes in question had neither been transported nor
8 offered for transport off-site at the time of the alleged infraction,
9 we conclude that the requirements of WAC 173-303-190(2) and (3) were
10 not violated. The standard Department of Transportation stickers
11 warning of the general nature of the hazard were, therefore, not
12 required.

13 V

14 WAC 173-303-200(1)(a) requires dangerous waste to be shipped to a
15 designated off-site treatment, storage or disposal facility (or placed
16 in such a facility permitted on-site) within 90 days after the date of
17 generation.

18 On the record before us at least two of the barrels in question
19 bore accumulation dates showing that this limitation had barely been
20 exceeded on November 2, 1984. The Air Force argues that Ecology did
21 not prove that these barrels were, in fact, among those six barrels
22 which contained dangerous waste and, therefore, that this violation
23 was not made out.

24 We concur in the first of these propositions, but disagree with
25 the latter. We believe that a prima facie case of violation was made

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1 out when Ecology showed that containers marked "Hazardous Waste" had
2 accumulation dates over 90 days old. At that point it became the Air
3 Force's obligation to go forward with evidence showing either that the
4 barrels in question did not contain dangerous waste or that the
5 accumulation dates were in error.

6 This the Air Force did not do. Therefore, we conclude that WAC
7 173-303-200(1)(a) was violated.

8 VI

9 WAC 173-303-200(1)(c) requires that the date on which each period
10 of accumulation commences "is marked and clearly visible for
11 inspection on each container."

12 We have found as a fact that each container here was so marked and
13 conclude that the ability of the Air Force later to re-mark the faded
14 dates is sufficient to meet the "clearly visible" standard. WAC
15 173-303-200(1)(c) was, thus, not violated.

16 VII

17 WAC 173-303-200(1)(d) requires, in addition to the words
18 "dangerous waste" or "hazardous waste," that each container be marked
19 with a label or sign which "identifies the major risk(s) associated
20 with the waste in the container or tank for employees, emergency
21 response personnel and the public."

22 The Air Force argues that putting the name of the material; e.g.,
23 PD 680, on the barrel meets this requirement in the controlled
24 environment of the air base. They note that base personnel and the
25 fire department are familiar with the substances likely to be

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1 encountered there.

2 We do not believe this regulatory requirement establishes a
3 sliding standard varying with the anticipated sophistication of the
4 people most likely to encounter dangerous waste in an emergency. For
5 emergencies everything must be made as simple and as clear as
6 possible. We conclude that the failure to place markings of any kind
7 on the barrels of dangerous waste (whether Department of
8 Transportation stickers or otherwise), describing the major risks
9 directly and explicitly was a violation of WAC 173-303-200(1)(d).

10 VIII

11 WAC 173-303-630 addresses the use and management of dangerous
12 waste containers. Subsection (5)(b) thereof states:

13 A container holding dangerous waste must not be
14 opened, handled or stored in a manner which may
rupture the container or cause it to leak.

15 The Air Force went to considerable lengths to show that the edge
16 of "D" ramp where the barrels were was a relatively safe place. They
17 point out that the regulations do not explicitly require 90-day
18 storers to store indoors.

19 Nonetheless, the entire context of the container management
20 regulation leads us to conclude that the degree of safety required to
21 meet this requirement was not present at the open air site in question
22 where no physical impediments to vehicular or other access exist.

23 We believe this is a close question and do not regard the
24 violation as a particularly egregious one. We are influenced by
25 Ecology's strong assertion that they would never, if asked, have

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1 approved such storage. In this situation, the agency's interpretation
2 of its own rules is entitled to considerable deference.

3 IX

4 Since we sustain three of the five violations asserted, we are
5 faced with the question of the appropriateness of the penalty assessed.

6 We evaluate penalties by considering factors bearing on
7 reasonableness. These include:

8 (a) the nature of the violation;

9 (b) the prior behavior of the violator;

10 (c) the actions taken after the violation to solve the problem.

11 Jensen's Kent Prairie Dairy v. Department of Ecology, PCHB No. 84-240
12 (November 6, 1984).

13 X

14 Of these three factors, we see the first as by far the most
15 important. In the instant case we cannot say, all things considered,
16 that the three violations sustained were of major gravity. We cannot
17 close our eyes to the fact that the great majority of the barrels
18 observed on November 2, 1984, did not contain dangerous waste.
19 Moreover, we must note that no adverse consequences to people or the
20 environment resulted from the labeling and storage violations for the
21 containers which did contain dangerous wastes.

22 XI

23 Ecology's presentation heavily emphasized the history of problems
24 with dangerous waste compliance at McChord. Whatever, the sins of the
25 past, they are relevant only to the specific problems of the present.

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1 We think the performance of the Air Force in this overall area
2 should be as a shining example. It is disappointing to learn
3 otherwise. However, we do not see any particular history of
4 violations related to the kinds of problems discovered in the instant
5 case.

6 The importance of history to a civil penalty is to show a pattern
7 of related non-compliance, culminating in the events giving rise to
8 the instant fine. But it is not the past violations themselves for
9 which the penalty is levied. They are, rather, a source of reference
10 for trying to set the level of deterrence appropriate for the
11 violations charged in the present situation. (By analogy, that a
12 person has had a long history of reckless driving does not justify a
13 major fine against him for overparking.)

14 XII

15 By Ecology's admission, the Air Force has made considerable
16 progress at McChord in setting their house in order where dangerous
17 waste is concerned. The levying of the civil penalty does not appear
18 to have been the prime motivating factor. The major impetus appears
19 to have been the inspection findings following the inspection of May
20 2, 1984. But whatever has produced the movement toward compliance at
21 the base, it is clear that the desired consciousness raising has
22 occurred.

23 XIII

24 Mindful that the penalties imposed are civil in nature and that
25 their purpose is not primarily to exact retribution but to change

1 behavior and deter violations generally, we hold that a penalty of
2 \$10,000 is excessive for the three violations sustained in this case.
3 Under all the facts and circumstances, we conclude that the Order set
4 forth below is appropriate.

5 XIV

6 Any Finding of Fact which is deemed a Conclusion of Law is hereby
7 adopted as such.

8 From these Conclusions of Law the Board enters this
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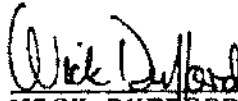
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ORDER

The Notice of Civil Penalty (No. DE 84-736) is reversed insofar as based upon violation of WAC 173-303-190(2) and (3) and WAC 173-303-200(1)(c). Said Notice is sustained as to violation of WAC 173-303-200(1)(a), WAC 173-303-200(1)(d) and WAC 173-303-630(5)(b). The \$10,000 civil penalty assessed by Ecology against the Air Force is hereby abated to \$3,000 and, in such amount, is affirmed.

DONE at Lacey, Washington, this 18th day of August, 1986.

POLLUTION CONTROL HEARINGS BOARD


WICK DUFFORD, Presiding Officer

 8/18/86
LAWRENCE J. FAULK, Chairman